(2) (2)

No. 10-238 & No. 10-239

SUPREME COURT, U.S.
FILED
SEP 16 2010
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ARIZONA TAXPAYERS ACTION COMMITTEE, DEAN MARTIN, and RICK MURPHY,
Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, LORI S. DANIELS, and LOUIS HOFFMAN in their official capacities as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, CLEAN ELECTIONS INSTITUTE, INC., and JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,,
Respondents.

and

JOHN MCCOMISH, NANCY MCLAIN, and TONY BOUIE,
Petitioners,

v.

KEN BENNETT, in his official capacity as Secretary of State of the State of Arizona; and GARY SCARAMAZZO, ROYANN J. PARKER, JEFFREY L. FAIRMAN, LORI S. DANIELS, and LOUIS HOFFMAN in their official capacities as members of the ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, CLEAN ELECTIONS INSTITUTE, INC., and ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ARIZONA TAXPAYERS ACTION COMMITTEE, DEAN MARTIN, and RICK MURPHY,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF PETITIONERS

ALLISON R. HAYWARD
Counsel of Record
CENTER FOR COMPETITIVE POLITICS
124 S. West Street, Suite 201
Alexandria, VA 22314
(703) 894-6800
ahayward@campaignfreedom.org

September 16, 2010 *Counsel for Amicus Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
Introduction	3
I. STUDIES UNABLE TO SHOW THAT CLEAN ELECTIONS LAWS DELIVER PROMISED BENEFITS	6
A. Studies from federal and state governments show no real benefits in jurisdictions from "clean elections" laws	6
1. Federal Government Reports from the Government Accountability Office and the Congressional Research Service	6
2. State Government Reports From Arizona, Maine, and New Jersey	8
B. Academics have been unable to establish the benefits, if any, of adopting government funded "clean elections" programs	10
II. THE BURDENS IMPOSED BY "CLEAN ELECTIONS" REGIMES ARE SIGNIFICANT ACROSS THE NATION	17
CONCLUSION	18

TABLE OF AUTHORITIES

CASES — Page

McComish v. Bennett, 605 F.3d 720 (9th Cir. 2010) 1, 4, 17

Randall v. Sorrell, 548 U.S. 230, 236-37 (2006) 16

STATUTES

Bipartisan Campaign Reform Act of 2002 Pub. L. No. 107-155, 116 Stat. 81 (2002) 6

Arizona Clean Elections Act, Ariz. Rev. Stat. § 16-940 *et seq.* 3

Ariz. Rev. Stat. § 16-952 1

Ariz. Rev. Stat. § 16-952(A) 3

Ariz. Rev. Stat. § 16-952(C) 3

MISCELLANEOUS

GAO, *Campaign Finance Reform: Experiences in Two States That Offer Full Public Funding for Political Candidates* (GAO-10-390) (May 2010) 7

Prof. Michael McDonald, Early Voting 2008, *available at* http://elections.gmu.edu/Early_Voting_2008_Final.html 7

R. Sam Garrett, *Public Financing of Congressional Campaigns: Overview and Analysis* (CRS Aug. 4, 2009) 8, 18

Arizona Clean Elections Commission, *Statewide Voter Survey, Jan. 2008, available at* http://www.azcleanelections.gov/2007-2008-docs/Survey_sflb.ashx 8, 9

Maine Commission on Governmental Ethics and Election Practices, *2007 Study Report* 9

TABLE OF AUTHORITIES—Continued

Page

New Jersey Election Law Enforcement Commission, 2007 *Fair and Clean Elections Report* (Mar. 28, 2008), *available at* http://www.elec.state.nj.us/clean_elect/downloads/ce_report2007.pdf 9, 10

Kenneth Mayer, Timothy Werner and Amanda Williams, *Do Public Funding Programs Enhance Electoral Competition?*", MICHAEL P. MCDONALD AND JOHN SAMPLES, EDS., THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS 245, 246 (2006) ... 10-11

Primo, David M., Jeffrey Milyo, and Tim Groseclose, *State Campaign Finance Reform, Competitiveness, and Party Advantage in Gubernatorial Elections*, in THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS, *supra* at 268, 269 11

Nolan Reichl, WHAT WE KNOW AND WHAT WE DON'T: A REVIEW OF THE LITERATURE EMPIRICALLY ANALYZING THE EFFECTS OF STATE CAMPAIGN FINANCE REFORM LAWS at 34-35 (Apr. 21, 2006), *available at* http://ssrn.com/abstract=924434 11

Michael G. Miller, *After the GAO Report: What do We Know about Public Election Funding*, *available at* http://sites.google.com/site/millerpolsci/research 12, 13

TABLE OF AUTHORITIES—Continued

Page

Michael Miller, *Gaming Arizona: Public Money and Shifting Candidate Strategies*, PS: POLITICAL SCIENCE & POLITICS (July 2008) 13

William M. Salka, *Publicly Funded Legislative Campaigns Through Citizens Election Programs: Who Participates and Does it Matter?*, *available at* http://ssrn.com/abstract=158114 ..... 13, 14

Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 STATE POLITICS AND POLICY QUARTERLY 263 (2008) 14

Michael J. Brogan, *Experiment and Institutionalization: Clean Elections in New Jersey*, 7 LEX LOCALIS – JOURNAL OF LOCAL SELF-GOVERNMENT (2009), *available at* http://pub.lex-localis.info:60/index.php/LexLocalis/article/view/7.4.371-392%282009%29 14

Raymond J. La Raja, *Does Public Funding of Elections Encourage More Citizens to Run for Office?*, *available at* http://ssrn.com/abstract=145095 14

Keith Hamm and Robert E. Hogan, *Perspectives of State Legislative Candidates on Connecticut's Implementation of Clean Election Law*, *available at* http://ssrn.com/abstract=1450959 15

TABLE OF AUTHORITIES—Continued

Page

Beth Ann Rosenson, *The Effect of Political Reform Measures on Perceptions of Corruption*, 8 ELECTION LAW JOURNAL 31, 41 (2009) 15

Vincent G. Moscardelli, *Money, Participation and Deliberation in the Connecticut General Assembly*, *available at* http://ssrn.com/abstract=1452226 15

Thomas Stratmann, *Do Strict Electoral Campaign Finance Rules Limit Corruption*, 1 CESIFO DICE REPORT (2003), *available at* http://www.cesifo.de/~DocCIDL/dicereport1-03-research-reports-2.pdf 16

Michael G. Miller, *Citizen Engagement and Voting Behavior in Publicly Funded Elections*, *available at* http://sites.google.com/site/millerpolsci/research 16

Congressional Research Service, *Public Financing of Congressional Campaigns: Overview and Analysis* (Aug. 4, 2009) 17, 18

INTEREST OF THE *AMICUS CURIAE* [1]

The Center for Competitive Politics (or CCP) is a non-profit organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. CCP's mission, through studies, legal briefs, historical and constitutional analysis, and media communication, is to educate the public on the effects of money in politics, and the desirability of a more free and competitive electoral process.

CCP is interested in these cases because they challenge the selective governmental subsidy of political expression, which is part of a misguided effort to encourage participation in tax-funded political campaigns that cannot be shown to serve the state's legitimate interests. CCP believes these subsidies ultimately impede political activity and the flow of political information.

SUMMARY OF ARGUMENT

In the decision below,[2] the Ninth Circuit concluded that Arizona's clean elections law, including its statute titled "Equal Funding of Candidates" (*see* Ariz. Rev. Stat. § 16-952), survived intermediate scrutiny because it bore a substantial relation to the State's important interest in reducing *quid pro quo* corruption. CCP urges this Court to review this case, so it can reexamine the assumption that "clean elections" laws serve a sufficient state interest, whether

---

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, and no counsel or party funded its preparation or submission.

[2] The original decision of the court of appeals is reported at 605 F.3d 720. The court's amended decision is unreported, but included in parties' Appendix.

that interest is deemed "important" or "compelling." We wish to draw to the Court's attention the numerous independent evaluations of clean elections laws, and the lack of evidence that such laws benefit the political system or reduce corruption. Yet in this case, the court below presumed the state's interest had been shown, instead of requiring the state to bear its burden to show how any proper interest is served by these laws. This Court can correct that oversight by taking review of this case.

We believe it is impossible to conclude that government funding of campaigns, and (it follows) an incentive payment to participate in such a system, serve the state's anti-corruption interests. Arizona's law seeks not merely to equalize, but to assist participating candidates, by putting the government's thumb on the scale to insure that those candidates – but only those – will not be outspent. Arizona, and the court below, claims this is necessary to encourage candidates to participate in the public financing system, which, in turn, it claims is necessary to prevent corruption. But, the anti-corruption effect of public financing is unsupported by scholarly reviews of the evidence. Moreover, incentive payments pervert campaign communications by encouraging gaming of the system. Those state-imposed burdens on expression and association cannot pass any level of heightened scrutiny. The necessary rationale for the "Equal Funding of Candidates" payment is thus absent.

ARGUMENT

Introduction

The Arizona Clean Elections Act, Ariz. Rev. Stat. § 16-940 *et seq.* provides government funding for campaigns for many Arizona state elective offices.[3] Participation in the Act is voluntary. As an incentive to participate, the Act also guarantees "equal" funding when participating candidates face a traditionally funded primary or general election challenger who spends (in the primary) or raises (in the general) an amount over the "initial disbursement" the state gave the subsidized candidate.[4] The Act also adds to the participating candidate's funding when independent groups spend enough to bring the opponent's total above the amount of the subsidy.[5]

The title of the law, "Equal Funding for Candidates," is misleading. For example, if only one of four primary candidates enrolls in the program, and any one of the other three spends over his or her public grant level, the participating candidate alone can receive additional funding. If an outside interest group makes an independent expenditure on behalf of one of the opponents that brings the spending level

---

[3] The Act funds races for Governor, Secretary of State, Attorney General, Treasurer, Superintendent of Public Instruction, Corporation Commissioner, Mine Inspector, State Senator, and State Representative.

[4] Ariz. Rev. Stat. § 16-952(A). The additional amount is determined by the amount spent that exceeds the initial disbursement, less 6%, which is intended to reflect fundraising costs otherwise incurred, and certain adjustments for early fundraising not relevant here. The threshold is triggered by opposition spending in the primary, but by fundraising in the general election.

[5] Ariz. Rev. Stat. § 16-952(C).

over the participant's grant level, then the participating candidate (again, alone) can receive additional funding.

Proponents of the Act, as well as the court below, contend that the additional "equal" funding is essential to motivate Arizona candidates to participate in the Clean Elections Act. *McComish v. Bennett*, 605 F.3d 720, 735-37 (9th Cir. 2010). The court rejected the idea that the Act's regime could function without the incentive payment:

> If participants were not given matching funds, they would not join the program because they would not be viable candidates in their elections. ... In contrast, if the Act were to raise the amount of its lump-sum grants and do away with matching funds altogether, it would make the Act prohibitively expensive and spell its doom.

Id. at 736-37. For the court below, just keeping the Act viable served Arizona's interest in preventing *quid pro quo* corruption, since every candidate participating in the system would be one more candidate not accepting campaign contributions. *Id.* at 736. The court merely assumed that private funding of campaigns is both a necessary and exclusive source of corruption, and that the government's funding is a remedy.

Notwithstanding the appeals court's limited appreciation for the various means by which politicians can misbehave, lurking behind its analysis is the assumption that "clean elections" laws that provide government funding to campaigns have a salutary effect in the states that adopt them. If that were true, it could then follow that a provision like Arizona's "Equal Funding for Candidates" law performs

a worthwhile task by encouraging candidates to participate in a program that produces benefits overall. We wish to direct the Court's attention to the absence of any evidence that such benefits do accrue in these states.

There is no evidence that government financing of campaigns reduces corruption, or fosters indirect changes (like increased competitiveness or incumbent turnover) that then could be shown to reduce corruption in politics.[6] If "clean elections" systems fail to improve a jurisdiction's political system (and indeed some studies observe deterioration in some contexts) then the state's rationale for paying incentive funds evaporates. The court below was wrong to presume that state interests are served by clean election programs (and by extension this subsidy). Indeed, it should have required the state to demonstrate that this law served an anti-corruption interest, and was tailored to fit the state's interest. It is up to this Court to correct this holding, so that it does not function as authority in other cases, allowing state regulators to assert without evidence that some restriction or another fights corruption. Given the scholarly research we now present, we contend that Arizona, or any other state with such laws, would be unable to make this showing.

---

[6] As an aside, although enhancing competition is a permissible goal of government policy, this Court has never suggested that it constitutes a compelling interest that would overcome the First Amendment rights of speakers.

I. STUDIES UNABLE TO SHOW THAT CLEAN ELECTIONS LAWS DELIVER PROMISED BENEFITS

A. Studies from federal and state governments show no real benefits in jurisdictions from "clean elections" laws

1. Federal Government Reports from the Government Accountability Office and the Congressional Research Service

Federal and state governments have made only modest attempts to ascertain the benefits that states with tax funded "clean elections" programs might experience. Early studies found little effect, but were possibly handicapped by a limited data set, since the first full-funding programs took effect in 2000. Those studies that identified some benefits conceded that they were modest at best, and possibly not resulting from the programs at all. Other studies produced contradictory results. Thus, the best that can be said is that some governmental studies have possibly identified some modest correlating benefits, but the causal relationship between those improvements and the laws are not evident.

In the Bipartisan Campaign Reform Act of 2002, Congress mandated the Government Accountability Office ("GAO") to review the tax financing programs in Maine and Arizona. *See* Pub. L. No. 107-155, 116 Stat. 81 (2002). The GAO reported in 2003, with only two election cycles to examine, that it was too soon to observe whether the "clean elections" systems improved the intended goals of increasing competition, voter choice and participation, or confidence in government; or reducing campaign spending and interest

group influence. *See* GAO, *Campaign Finance Reform: Experiences in Two States That Offer Full Public Funding for Political Candidates* (GAO-10-390) (May 2010) (summarizing 2003 Report, GAO 03-453).

In 2007, the Senate directed GAO to revisit and update its study. In May 2010, GAO reported that it had found statistically significant changes in only one of the five goals of these government funding programs. It only observed a decrease in the winner's margin of victory in legislative races in both Maine and Arizona. GAO-10-390, *supra*, at 35-37. But GAO could not attribute this to the "clean elections" programs, however. Significantly, GAO found that spending in Arizona had increased, and that the public funding program changed the timing of campaign spending, shifting it toward the end of the campaign. *Id.* at 59-60. Individuals interviewed by GAO opined that spending increases were due in part to increases in independent spending, which triggered matching funds for participating candidates. *Id.* at 64-66. In reaction, nonparticipating candidates in Arizona had focused fundraising and spending activity at the very end of the campaign, so that participating opponents could not use effectively what matching funds they received. *Id.* at 80.[7] In the end, the GAO study could not resolve whether public funding served any of its articulated goals in either Arizona or Maine. *Id.* at 84.

---

[7] This is not a shift that campaigns would likely choose on their own. This delay in spending occurred notwithstanding the fact that more voters are casting their ballots early. Thus the matching subsidy directed campaign spending away from communicating with many voters before they voted. *See* Prof. Michael McDonald, *Early Voting 2008*, http://elections.gmu.edu/Early_Voting_2008_Final.html.

The Congressional Research Service has also reviewed government financing of state campaigns. *See* R. Sam Garrett, *Public Financing of Congressional Campaigns: Overview and Analysis* (CRS Aug. 4, 2009). This report, which is a survey of existing studies, observed that comparisons between programs are hard to construct given the variety of public funding programs. *Id.* at 42. Moreover, many studies are narrow in scope. *Id.* CRS noted that the evidence that public funding increases competitiveness in elections was "mixed." *Id.* at 43. In the cases of Arizona, Connecticut and Maine, it reported that only advocacy groups contend that competitiveness and diversity have improved under clean elections laws. *Id.* at 46. But CRS concluded instead that the data on effectiveness was contradictory. *Id.* at 47. "Consequently, there are few certainties about how public financing might apply to congressional campaigns." *Id.* at 50.

2. State Government Reports From Arizona, Maine, and New Jersey

State governments have also made modest efforts to ascertain the effectiveness of "clean elections" laws. The Arizona Clean Elections Commission is responsible for the administration of Arizona's public funding law. It has never assessed the Arizona Act overall, but has instead commissioned a series of surveys, most recently in 2008. This latest survey measured how state voters viewed the law. Arizona Clean Elections Commission, *Statewide Voter Survey*, Jan. 2008, http://www.azcleanelections.gov/2007-2008-docs/Survey.sflb.ashx. In general, substantial majorities in Arizona favored the law, but admitted to little knowledge of how it worked. When asked what they liked about the law, the most popular answer by far

(with 30% of respondents) was that it "leveled the playing field." *Id.* at 8.

Maine, by contrast, has reviewed its program. Maine Commission on Governmental Ethics and Election Practices, *2007 Study Report*. It observed some positive trends in increasing the number of candidates and reducing private money in politics, although admitted that these trends "might be difficult to attribute" to public financing. *Id.* at 1. This report conceded that total spending in races, including independent spending, had increased under tax funding, and observed that changing campaign finance "will not, by itself, control spending by PACs and political parties, encourage more substantive discussion of issues, or increase voter interest in elections." *Id.* at 2, *see also id* at 43-45. Notably, it identified as a *problem* in administration the narrow definition of "expenditures" that includes only express advocacy, which would follow from the constitutional constraints on legislation in this area. As in the GAO analysis, this Maine study observed that the law encouraged spending to shift later in the election so as not to trigger "matching funds" to participating candidates. *Id.* at 65-67. As noted, campaigns are shifting spending even though more voters are casting ballots early, before receiving these communications and contacts.[8]

In 2008, New Jersey assessed its 2007 Clean Elections Pilot Project, which provided public funding in three legislative districts. New Jersey Election Law Enforcement Commission, *2007 Fair and Clean Elections Report* (Mar. 28, 2008), http://www.elec.state.nj.us/clean_elect/downloads/ce_report2007.pdf.

---

[8] *See supra* note 7.

The 2007 program followed a 2005 pilot project involving two districts, for which only two candidates ever qualified. In the 2007 project, sixteen candidates running in three legislative districts received grants, and two also received "rescue money" in response to independent spending by an "outside" group, Commonsense America. *Id.* at 31, 39, 48. A third candidate excluded from a local news debate applied for rescue funds, but was rejected. Under the New Jersey law spending by a *bona fide* news organization is not deemed "as favoring or opposing any candidate." *Id.* at 49. The New Jersey Report observed that the Clean Elections Pilot Project did not improve turnout, *id.* at 35; did not reduce spending, *id.* at 41-42; and did not improve the public perception of politics, *id.* App. 1 at 8.

B. Academics have been unable to establish the benefits, if any, of adopting government funded "clean elections" programs.

In contrast with the scant number of government reports, academics have released numerous studies of governmental funding for campaigns. Despite these efforts, scholars can still say little definitively about the effect of such funding on politics and elections. As Dr. Kenneth Mayer, an expert in this case for the Respondents, observed when assessing the literature on whether public financing increased diversity, made elections more competitive, reduced private influence or costs: "Does public financing achieve any of these goals? The short answer is that nobody knows . . ." Kenneth Mayer, Timothy Werner and Amanda Williams, *Do Public Funding Programs Enhance Electoral Competition?*" IN MICHAEL P. MCDONALD AND JOHN SAMPLES, EDS., THE MARKET-

PLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS 245, 246 (2006). Mayer's own study suggested tentatively that public financing may increase the number of candidates and the number of races in which the victor wins by under 60% of the vote, and may reduce the incumbent reelection rate.

In the same anthology, a second set of scholars (one of whom served as an expert for Petitioners in this case) similarly stated that "[d]espite the attention given to electoral competitiveness and campaign money, and the assertions made by both proponents and opponents . . . we know surprisingly little about the impact of campaign finance laws on electoral outcomes." Primo, David M., Jeffrey Milyo, and Tim Groseclose, *State Campaign Finance Reform, Competitiveness, and Party Advantage in Gubernatorial Elections*, in THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS, *supra* at 268, 269. These scholars used a different model to conclude that public financing has an insignificant effect on the margin of victory.

One of the reasons scholars writing for a 2006 publication could express only tentative conclusions would be the lack of data at that time from states offering full governmental funding for campaigns. *See* NOLAN REICHL, WHAT WE KNOW AND WHAT WE DON'T: A REVIEW OF THE LITERATURE EMPIRICALLY ANALYZING THE EFFECTS OF STATE CAMPAIGN FINANCE REFORM LAWS at 34-35 (Apr. 21, 2006)(unpublished J.D. senior thesis, Stanford Law School), http://ssrn.com/abstract=924434. There are thousands of state and local elections nationally, but only a limited number in Maine and Arizona, the two jurisdictions with full public financing since 2000. Within that

group, some candidates opt into the system, but not all do, reducing again the number of incidents available for study. Arizona also elects two representatives for each State House seat, making difficult any comparisons between its elections and those for conventional single-representative districts in other states.

Given the passage of time, and the additional data from 2006 and 2008, has more recent scholarship been able to generate more definitive results? No.

Perhaps the most recent paper, by Michael Miller of the University of Illinois, is a critique of the GAO study from 2010 discussed above. Michael G. Miller, *After the GAO Report: What do We Know about Public Election Funding* (working paper, July 17, 2010), http://sites.google.com/site/millerpolsci/research. Miller questioned whether GAO's contention that independent expenditures have risen was anecdotal, but nevertheless concluded that more study of independent expenditures would be needed. *Id.* at 10. He noted that participating candidates in Maine tend to win, while those in Arizona tend to lose, and attributed this fact to ideological differences between the two states.

Political scientists disagree about the best statistical techniques, and often attribute contradictory findings among studies to methodological differences. Miller's paper criticized many GAO techniques. Miller observed that GAO did not attempt to evaluate the effect of public funding on candidate diversity (but conceded that the evidence suggests that "clean elections" do not alter the number or demographics of legislative candidates). *Id.* at 16. Miller rejected the way GAO evaluated competitiveness, and criticized its unwillingness to attribute lower victory margins

to public funding. Yet Miller credited the GAO finding that the matching funds provisions encourage candidates to withhold spending until late in the election. *Id.* at 21; *see also* Michael Miller, *Gaming Arizona: Public Money and Shifting Candidate Strategies*, PS: POLITICAL SCIENCE & POLITICS (July 2008).

Many academic studies have evaluated who uses public funding, and whether new or different candidates are able to enter politics because of these programs. Overall, there is little evidence that a "new kind" of politician will emerge from tax-funded jurisdictions. A very recent working paper observed only that participation in tax funding programs is increasing, and that Democratic candidates are relatively more likely to participate than Republicans. William M. Salka, *Publicly Funded Legislative Campaigns Through Citizens Election Programs: Who Participates and Does it Matter?* (paper delivered at the Western Political Science Ass'n annual meeting, April 2010), http://ssrn.com/abstract=158114.[9] This study also suggested that "public money is more likely to be used by stronger candidates, either those in more competitive districts or those who have previously won elective office." *Id.* at 26. Overall, Salka's study found that candidates who used public funding tended to receive more votes, and candidates

---

[9] This amicus brief cites working papers and papers that have been presented but not published. We believe it is worthwhile to assess the most recent scholarship in this area, given that data becomes more plentiful (and conclusions more robust) with every election. Given the time it takes for a paper to make it through the academic cycle to formal publication in a peer-reviewed journal, we believe it is necessary to consider works in progress that can draw on data from 2006 and 2008. The cited authors are experts in this field with sound professional reputations.

whose challengers accepted public funding tended to receive fewer votes. *Id.* at 27. Similarly, a 2008 published study concluded that quality challengers are attracted to public funding, and thus these programs "do not simply fill the coffers of unserious and low-quality candidates." Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 STATE POLITICS AND POLICY QUARTERLY 263, 277 (2008)[10]. Nevertheless, he found "the Arizona clean elections law had no significant effect on increasing mean electoral competition in the [State Senate] overall." *Id.* at 273, *see also* Michael J. Brogan, *Experiment and Institutionalization: Clean Elections in New Jersey*, 7 LEX LOCALIS – JOURNAL OF LOCAL SELF-GOVERNMENT (2009), http://pub.lex-localis.info/60/index.php/Lex Localis/article/view/7.4.371-392%28200 9%29 (concluding that clean elections programs unlikely to make elections more competitive).

Another scholar in a recent paper observed, based on survey research, that public funding does not change the demographic characteristics of the individuals who decide to run for office. Raymond J. La Raja, *Does Public Funding of Elections Encourage More Citizens to Run for Office?* (paper presented to the 2009 annual meeting of the American Political Science Association) http://ssrn.com/abstract=145095.[11] But another paper, comparing survey results from

---

[10] Although published in 2008, this paper includes data only through 2006.

[11] The American Political Science Association's State Politics and Policy Section dedicated its 2009 panel to "Connecticut's New Public Financing System: A First Look" held September 5, 2009, *see* http://www.apsanet.org/mtgs/program_2009/program.cfm?event=1513708

Connecticut candidates in 2006 (before public financing) and 2008 (after) reported evidence of some demographic diversification, and also an increased role for outside groups in issue advertising. Keith Hamm and Robert E. Hogan, *Perspectives of State Legislative Candidates on Connecticut's Implementation of Clean Election Law* at 31 (paper also presented to the 2009 annual meeting of the American Political Science Association) http://ssrn.com/abstract=1450959. Thus it appears that governmental funding goes to candidates who have already shown political skill in the traditionally funded system, with little if any effect on diversity or competition.

When the focus moves away from the laws' effects on competitiveness (where changes might indirectly reduces corruption as noted), and moves more directly to consider their effects on corruption, the picture becomes even bleaker for advocates of governmental campaign financing. A recent study concluded that strong campaign finance laws (including governmental financing as the most stringent of such laws) lead to increases in perceptions of corruption. Beth Ann Rosenson, *The Effect of Political Reform Measures on Perceptions of Corruption*, 8 ELECTION LAW JOURNAL 31, 41 (2009). As to *quid pro quo* corruption, a study examined participation in committee deliberations by members of the pre-Clean Elections Connecticut General Assembly from 2003-08 revealed "no evidence that money can buy legislators' time and effort, even on bills identified || as priorities." Vincent G. Moscardelli, *Money, Participation and Deliberation in the Connecticut General Assembly* at 13 (paper presented at the 2009 annual meeting of the American Political Science Association), http://ssrn.com/abstract=1452226. Economist Thomas Stratmann concluded, in a paper published in 2003 comparing the

laws in various nations, that contribution limits were positively correlated with increased corruption. Thomas Stratmann, *Do Strict Electoral Campaign Finance Rules Limit Corruption*, 1 CESIFO DICE REPORT, 24-27 (2003), http://www.cesifo.de/~DocCIDL/dicereport1-03-research-reports-2.pdf. Yet one study found that government funding permitted recipient candidates to spend more time campaigning, less time fundraising, and that their races experienced less down-ballot roll off. Michael G. Miller, *Citizen Engagement and Voting Behavior in Publicly Funded Elections* (working paper) http://sites.google.com/site/millerpolsci/research). How candidates use their time is not itself a state interest justifying regulation, *see Randall v. Sorrell*, 548 U.S. 230, 236-37 (2006), and has an attenuated connection to any interest in combating corruption.

Even in the most recent scholarship available, no consistent picture emerges about the effects of selective government funding on campaigns and elections. Studies performed using professional econometric analyses draw contradictory conclusions, when they detect any effect at all. Moreover, there is much debate within social science about the appropriate data to study, and the proper methodology to use. It is beyond the cognizance of this Court, or any court, to settle those disputes. But the Court can surmise that each of these scholars is toiling in good faith. That being said, the benefits of government financing to a state seeking to reduce corruption have eluded observation thus far. It following that a governmental incentive payment also lacks sufficient justification.

II. THE BURDENS IMPOSED BY "CLEAN ELECTIONS" REGIMES ARE SIGNIFICANT ACROSS THE NATION

In the case below, the United States Court of Appeals for the Ninth Circuit concluded that Arizona's "clean elections" law, including its "Equal Funding of Candidates" provision, survived intermediate scrutiny because it bore a substantial relation to the State's important interest in reducing *quid pro quo* corruption. 605 F.3d at 732-33. We express no opinion in this brief on whether the Circuit adopted the correct standard of scrutiny. We write to urge the Court to reexamine the assertion that selective government funding laws, including subsidies for participation in government funding, serve a sufficient state interest, whether it be deemed "important" or "compelling." We wish to draw to the Court's attention the numerous independent evaluations of clean elections laws that attempt to identify the beneficial effects of funding campaigns with public tax dollars. As noted, it is impossible, from this body of research, to conclude that these systems serve the state's anti-corruption interests. Correspondingly, the rationale for incentive payments to participants also fails.

This issue is of national significance, and the Court should realize that the same issues presented in this case have resonance throughout the country. Seven states have offered some form of the so-called "clean money" model of public tax financing: Arizona, Connecticut, Maine, New Mexico, North Carolina, Vermont, and a New Jersey pilot program. *See* Congressional Research Service, *Public Financing of Congressional Campaigns: Overview and Analysis* (Aug. 4, 2009) at 35. Massachusetts also had a "clean

money" program from 1998-2003. *Id.* at 41. The burdens these laws, with their incentive payments for participants, impose, extend beyond Arizona, and resolving their constitutionality is critical to the proper functioning of American politics.

CONCLUSION

Government funding for political campaigns (such as the Arizona Clean Elections Act), enjoys ardent support among some activists.[12] Many states, and members of Congress, continue to entertain the adoption of similar systems. Yet neither governmental studies, nor the work of independent scholars can confirm that these laws further the state's interest in reducing corruption or the appearance of corruption. Nor is there any evidence that these programs further goals that might indirectly improve the quality of governance, such as competition or diversity. Since Arizona's "Equal Funding of Candidates" statute offers an incentive payment for some candidates to participate in the Act, if the rationale for the Act cannot be defended, neither can the rationale for the incentive subsidy. This Court should grant review of the decision below, and resolve for all states entertaining similar systems that the burdens imposed by the subsidy cannot be justified by a sufficient state interest, and is therefore unconstitutional.

---

[12] Public support is less evident. Public opinion data vary depending on how pollsters word their questions. *See* Garrett, *supra* at 48-49. Public opinion is negative when polling questions reference the governmental source of funds for such programs. *Id.*

Respectfully submitted,

ALLISON R. HAYWARD
Counsel of Record
CENTER FOR COMPETITIVE POLITICS
124 S. West Street, Suite 201
Alexandria, VA 22314
(703) 894-6800
ahayward@campaignfreedom.org

Counsel for Amicus Curiae

September 16, 2010